Supreme Court, U. S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

NO. 79-1626

LAS VEGAS SUN, INC., a Nevada Corporation,
Petitioner,

vs.

SUMMA CORPORATION, dba CASTAWAYS CASINO, FRONTIER HOTEL, and DESERT INN HOTEL; HOTEL PROPERTIES, INC., dba LANDMARK HOTEL; HUGHES TELEVISION NETWORK, INC., dba SANDS HOTEL; FIRST NATIONAL BANK OF NEVADA, dba SILVER SLIPPER; FRANK W. GAY; and CHESTER DAVIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on November 15, 1979, which affirmed a judgment by the United States District Court for the District of Nevada.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is reported at 610 F.2d 614 (9th Cir. 1979), and is attached as Appendix "A" to this petition.

The trial commenced without a jury on January 31, 1977, before the Honorable Warren J. Ferguson sitting by designation as the United States District Court for the District of Nevada. After five trial days the trial was recessed pending final argument. On February 17, 1977, however, Judge Ferguson declared a mistrial and on March 11, 1977, the Honorable Samuel Conti of the United States District Court for the Northern District of California was assigned to the case for all purposes. Judge Conti adopted all the rulings in the case by Judge Ferguson and, rather than conduct a new trial, advised the parties that he would decide the case on the trial transcript. On April 21, 1977, final argument was had before the Court; and on May 23, 1977, judgment was entered against the petitioners on all counts. The Findings of Fact and Conclusions of Law of the District Court are attached as Appendix "B" to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 15, 1979. A timely petition for rehearing was filed on November 29, 1979, and denied on January 17, 1980. (Appendix "C" to this petition.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with nations, is declared to be illegal . . ."

QUESTIONS PRESENTED FOR REVIEW

1. Whether common ownership and control of separate corporations can serve to liberate those corporations from the impact of the antitrust laws.

2. Whether the Court below erred in its holding that an agreement among competitors to refuse to deal with petitioner is not a *per se* unlawful combination in restraint of trade in light of the long history of this Court's opinions on group boycotts commencing with *Fashion Originators' Guild v. FTC,* 312 U.S. 457 (1941).

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust suit brought by petitioner against respondents under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) to recover damages and to secure injunctive relief for violations of Section 1 of the Sherman Act (15 U.S.C. § 1), Section 8 of the Clayton Act (15 U.S.C. § 19), and the common law of the State of Nevada.

Petitioner Las Vegas Sun, Inc., through its majority stockholder Herman M. (Hank) Greenspun, owns and publishes the *Las Vegas Sun.* The *Sun* is one of two major daily newspapers of general circulation published and distributed in Las Vegas, Nevada.

The corporate respondents are Summa Corporation ("Summa"); Hotel Properties, Inc. ("HPI"); Hughes Television Network, Inc. ("HTV"); and First National Bank

of Nevada ("FNB").[1] These respondents own or operate the following casinos and hotels located in the "Strip" area of Las Vegas, Nevada: the Sands Hotel, the Frontier Hotel, the Desert Inn Hotel, the Landmark Hotel, the Silver Slipper Casino and the Castaways Casino.

Respondents Frank Gay and Chester Davis are individuals. At the time of the filing of the complaint, Frank Gay served as an executive officer and director of each corporate defendant except FNB, and Chester Davis served as chief counsel for Summa and as a director of each corporation except FNB.

The following table illustrates the ownership, leasees, gambling permits and licensees of each of the hotel casinos:

Hotel	Owner	Leasee	Licensee
Frontier	Summa	None	Howard R. Hughes, Jr. Officers of Summa Directors of Summa
Desert Inn ...	Desert Inn Assn.	Summa	Howard R. Hughes, Jr. Officers of Summa Directors of Summa
Sands	HTV	Summa	Howard R. Hughes, Jr. Officers of Summa Directors of Summa
Landmark ...	Summa	HPI	Howard R. Hughes, Jr. Officers of Summa Directors of Summa
Castaways ...	Summa (FNB)	None	Howard R. Hughes, Jr. Officers of Summa Directors of Summa

The principal charge in this case is that the various hotel casinos owned or operated by respondents agreed to cancel all their advertising in petitioner's newspaper in furtherance of Howard Hughes' longstanding plan to run the *Sun* out of business.

[1]FNB was sued in its capacity as Special Administrator of the Estate of Howard Hughes, Jr., deceased.

The important question which is presented to this Court is whether commonly owned but separate corporations which own and operate competing hotel casinos in Las Vegas, Nevada, can combine and conspire to withhold their hotel advertising from one of the two major newspapers in the city for the purpose of silencing that newspaper's unfavorable editorial criticism.

B. Material Facts

1. Background of the Las Vegas Newspaper Market

The *Sun* has been in circulation in Las Vegas since 1950 when Hank Greenspun bought a small, weekly newspaper called the *Las Vegas Free Press,* changed it to the *Las Vegas Sun* and converted it into a daily publication. With the exception of a group boycott by the hotel casinos in 1952 motivated by the political pressure of the late United States Senator Patrick McCarran in which the casinos withdrew their advertising from the *Sun,*[2] the *Sun* continued its steady growth to a position where, in November of 1963, it had attained approximately the same daily circulation as its rival the *Las Vegas Review Journal,* a paper which had enjoyed a forty year monopoly in the Las Vegas market until the birth of the *Sun* in 1950. By November of

[2]This boycott was ultimately enjoined by the late Chief Judge Roger Foley of the United States District Court for the District of Nevada in *Greenspun v. McCarran,* 105 F.Supp. 662 (D. Nev. 1952), in which Chief Judge Foley, paraphrasing the statement of District Judge Freed in *United States v. Lorain Journal,* 92 F.Supp. 794, said:

> "Having the plan and desire to injure the *Sun,* no more effective and more direct device to impede the operations and to restrain the commerce of the *Sun* could be found by the conspirators than to cut off its bloodstream of existence—the advertising revenues which control its life or demise." 105 F.Supp. at 664.

1963, the *Sun* had overtaken the *Review Journal* in advertising lineage.

On November 21, 1963, a fire destroyed the entire publishing facilities of the *Sun*. As a result, the *Sun* was unable to publish in Las Vegas. Consequently, and at great expense and effort, the newspaper was compiled in makeshift offices throughout Las Vegas, flown to Phoenix and Los Angeles for printing in the afternoon, and reflown to Las Vegas late at night so that the first edition could be on the doorsteps in the morning. Notwithstanding this disaster, the financial burden of the airlift, the cost of the special printing and the resulting debt, the *Sun* did not miss a day's publication. However, its circulation and advertising did decline. After many months, temporary printing facilities were improvised in a Nissan hut warehouse in Las Vegas. The *Sun* began the arduous process of building back its circulation and it succeeded to the point that, at the time of this lawsuit, it had a circulation of approximately 40,000 compared to the circulation of the *Review Journal* of some 70,000. Moreover, at the time of this lawsuit, the *Sun's* share of the advertising placed by the respondents' hotel casinos in the two major newspapers in Las Vegas was approximately 50 percent.

Respondents own and operate several hotel casinos on the Las Vegas Strip. Each competes with each other for patronage by the public. Each is managed independently. In no place are these facts more evident than in the examination conducted by Judge Ferguson of Frank Gay. The Court developed the following facts: (1) that respondents had six hotels in Las Vegas, Nevada; (2) that each is autonomous; (3) that the intention of each is to develop

its own individuality; (4) that each competes with respondents' other hotel casinos and all other hotel casinos in Las Vegas; (5) that each of the respondents' hotels is on a separate piece of property; (6) that each hotel makes its own policies concerning its internal operations; and (7) that each, for all outside appearances, is independent. (T. 696).[3]

Not only did the respondents hold their casinos out as competitors, but their own documents show that it was each respondent's policy to deal with the other at arm's length. Although frequently one respondent would lease a hotel casino from the other for tax purposes, "all lease arrangements were made at arm's length and are supported by appraisal reports" and "lessors of the properties [had] no interest in the business operations of the lessee." (EX. 1)

Prior to the boycott on April 12, 1976, the *Sun* and its Las Vegas competitor, the *Review Journal,* shared in the advertising inches placed by the respondents' casinos on a 50/50 basis. After respondents' boycott, the *Sun's* share of respondents' advertising was reduced to zero.

2. Evidence of Respondents' Agreement to Boycott the Sun

Beginning in the afternoon of April 12, 1976, and ending the next day, all of the hotel casinos operated by respondents cancelled en masse their advertising in the *Sun*. This cancellation was effected directly by some hotel casinos and through independent advertising agencies by others. It marked the first time that the respondents' hotel casinos

[3] "EX" refers to trial exhibits; "R" refers to the Clerk's Records on Appeal; and "T" refers to the Reporter's Transcript.

had failed to advertise through the *Las Vegas Sun* since 1952.

Richard G. Danner, General Manager of the Sands Hotel, which is owned by respondent HTV, testified that Perry Lieber, the General Manager of Public Relations for Summa, called him on the 12th of April and advised him that the Sands must discontinue all future advertising in the *Sun*. (T. 341). No reason for the cancellation was given other than the fact that an article had appeared in the *Sun* that day which was critical of Frank Gay, the President of Summa. (T. 346). In addition, Danner was assured by Lieber that similar instructions to cancel advertising in the *Sun* were being issued to all of the respondents' hotels (T. 341), and that he would not be the only one to cancel advertising in the *Sun*. (T. 343-44). In response to a question as to whether or not he believed that the Sands was at a competitive disadvantage with the other hotel casinos by not advertising in the *Sun*, Danner testified: "Well, I'll state it this way: I think it was a calculated risk . . . when you curtail your advertising, you are bound to affect your business to some degree . . ." (T. 354). And in response to a question as to whether or not the Sands would have cancelled advertising in the *Sun* if it were the only hotel casino to do so, Danner testified: "Certainly I think I would have objected" . . . "because I didn't want to be the lone voice in the wilderness that was curtailing advertising . . . I wanted to remain as competitive as possible." (T. 355)

The three principal actors through whom respondents executed their joint refusal to deal with the *Sun* were Perry Lieber, Frank Gay and Robert Bennett, the Director of Public Relations for Summa.

According to Lieber, on April 12, 1976, "the first event of the day" was a story that was published in the *Sun* which was critical of Frank Gay's managerial ability. (T. 496). Lieber immediately phoned Bennett, who was in Los Angeles, and read him the article over the phone. (T. 498-99). Bennett then told Lieber to stand by while he contacted Gay. (T. 499-500). Gay told Bennett that the cancellation of advertising in the *Sun* was a decision to be made by him and Lieber. (T. 500). Bennett then called Lieber back and instructed him to cancel all advertising in the *Sun*. (T. 501-02). As he told each hotel to cancel advertising in the *Sun*, he likewise advised each that the others were cancelling as well. (T. 476-77).

Although Lieber testified that he did *not* speak to Gay at all on April 12th (T. 504-05), Bennett testified that on the morning of the 12th, while he was in Gay's office in Los Angeles, Gay took a telephone call from Lieber who described to Gay the article appearing in the *Sun*. (T. 582-83). At that point Bennett advised Gay that he and Lieber had been considering the cancellation of the *Sun* and Gay said that he would leave that decision up to him and Lieber. (T. 583). Bennett understood from Gay that he had authority to cancel advertising only in the *Sun*. (T. 588).

Gay, contrary to both Lieber and Bennett, testified that on the morning of April 12th he neither spoke with Lieber on the phone concerning the *Sun* article (T. 660), nor discussed with Bennett the possibility of cancelling advertising in the *Sun*. (T. 661). He denied giving authority to Bennett to cancel any advertising. (T. 661). According to

Gay, the first time he learned that advertising had indeed been cancelled in the *Sun* was upon the filing of this lawsuit. (T. 662). Notwithstanding the fact that the article which appeared in the *Sun* on the morning of April 12th quoted a handwritten memorandum by Howard Hughes critical of Gay, Gay denied being advised about the article that morning. (T. 658-661).

In any case and notwithstanding the conflicting testimony, the sum of the evidence is that on April 12, 1976, a decision was authorized by Frank Gay, at that time chief operating officer of Summa, Vice President of HPI and Vice President of HTV, to have each hotel casino owned by respondents cancel its newspaper advertising in the *Sun*. And this in fact was done.

3. Evidence of Respondents' Anticompetitive Motive

Almost from the very beginning, respondents, including the late Howard Hughes, sought to control major industries in Las Vegas, Nevada, including the news media.

Robert A. Maheu, Howard Hughes' alter ego in Las Vegas from 1966 to 1970, represented Hughes in the purchase of different properties in Las Vegas. Through Maheu, Hughes sought to purchase communications media in Las Vegas because Hughes "wanted to be in a position of control over [the] media." (T. 813). Maheu further testified that the reason Hughes sought to establish his influence over the media was "so that he could control the editorial policy and make sure that the media treated him pursuant to his likes." (T. 813).

When it subsequently developed that the *Sun* published critical articles about Hughes and the respondents, Hughes sought to get even.

Melvin Stewart, Hughes' personal male nurse who was with Hughes until his death in April of 1976, testified that Hughes "wanted to get rid of Mr. Greenspun (the publisher of the *Sun*); he wanted to break him." (T. 203). Indeed, Stewart remembered Hughes making the following comment about Greenspun:

> "We have to get rid of that son-of-a-bitch; we'll buy the *Las Vegas Review Journal* (the *Sun's* competitor) . . . if we have to, we'll give it away or sell it for a nickel a copy." (T. 203).

In addition, Stewart was able to identify a document written in Hughes' own hand and dated August 5, 1974, in which the following was stated as a directive from Hughes:

> "—attach everything Maheu and Greenspun have
>
> • • •
>
> —put 90 detectives on Greenspun's tail alone to be followed 24 hours a day—
>
> —move immediately to buy Don Rey's outfit 'Review Journal', etc. . . . sell 'Review' for 5 cents a copy . . ." (EX. 48).

This intent to destroy the *Sun* permeated Summa and clearly manifested itself through Summa's chief counsel and director, Chester Davis. For example, George E. Franklin, who during the relevant time period was the District Attorney of Clark County, Nevada, testified that Davis "discuss[ed] at great length that they had to somehow or other stop these articles by Mr. Greenspun"

(T. 146); that "there are other methods they were going to use as far as Mr. Greenspun was concerned" (T. 147); that "we've other ways to take care of Mr. Greenspun" (T. 147); and that "they were going to take Mr. Greenspun's newspaper away from him, or language to that effect". (T. 148). This testimony was given notwithstanding the fact that Franklin conceded that he had not been friendly with Greenspun for 25 years and that he would have been pleased if Davis had made good his threat. (T. 148-49).

Similarly, Frank H. Johnson, who during the relevant time was Chairman of the Nevada Gaming Control Board and who was present at the meeting with Davis and Franklin, testified that Davis "said that if the nature of the articles continued that 'we would end up—' and this is to the effect—'we will end up owning that newspaper.'" (T. 165).

In addition to the evidence presented through Hughes' own statements and memoranda, and in addition to the statements made by Chester Davis concerning Hank Greenspun, there is further evidence of the respondents' malicious intent to greatly injure, if not destroy, the *Sun*.

Hank Greenspun of the *Las Vegas Sun* was known to be in possession of certain handwritten memoranda by Howard Hughes. From time to time (including the morning of April 12, 1976), the *Sun* would publish certain of these memoranda. The evidence shows that some years prior to the respondents' boycott there had been an unauthorized entry and attempted burglary of Greenspun's office and safe at the *Sun*. (T. 972). There is considerable evidence

which connects the respondents with this crime. In any event, this evidence further demonstrates respondents' intent to harm petitioner.

David Waite, a photographer for the *Sun*, testified that Jams Cullen, who identified himself as a "security agent for the Hughes Tool Company" who was "working under Frank Gay" (T. 252), asked Waite if he could get a plan to Greenspun's office and to the conference room. (T. 253). Waite testified: "They wanted to know things like the right people they could approach who were close and the reason that they gave is that they wanted to get the newspaper away from Hank simply as a vindictive thing. The words that he said to me that I remember [are] that they were going to get that son-of-a-bitch." (T. 253).

Bennett, director of public relations for Summa Corporation and the individual who ultimately gave the instructions to cancel all advertising in plaintiff's newspaper, admitted that he arranged a meeting between Ralph Winte the chief of security for Hughes Tool Company, and E. Howard Hunt. (T. 532). Bennett told Hunt that Winte was a man "with whom you can discuss your investigation of Mr. Greenspun" and "who is in a position to give you some kind of answer." (T. 532). Subsequent to this initial meeting, Bennett had a further conversation with Hunt during which Hunt revealed to him that: ". . . instead of a routine investigation, we are going to make it look like a burglary so that we will not have to leave the office in exactly the same form as we found it after we break in. We can leave it in a state of disarray and we can get what we want—I prefer it that way." (T. 537).

Ralph Winte admitted that he met with Hunt and G. Gordon Liddy, in a hotel in Beverly Hills, following his first meeting with Hunt in Bennett's Washington office. (T. 305). Hunt and Liddy advised Winte that Greenspun had some of Hughes' handwritten memoranda (T. 307), and that "if they broke into Mr. Greenspun's safe they would take all of the documents and if there were any documents relative to Howard Hughes that they would give those documents to [Winte]." (T. 308). Winte was supposed to give them "support in Las Vegas," including a room, a car, and an airplane to take them out of the country. (T. 308). Winte advised Hunt and Liddy that he would have to discuss the matter with his superiors. (T. 308).

Although Winte denies having cooperated with Hunt and Liddy and denies that Summa was ever directly involved in the break-in (T. 311-16), E. Howard Hunt[4] testified that Winte provided Liddy and himself with a diagram of Hank Greenspun's private office at the *Sun* and agreed to provide local tactical support for the burglary. (T. 317-18). Indeed, Edward N. Becher, a private investigator who came forward to testify after hearing Winte's testimony in open Court, disclosed that as late as August of 1972, he had been approached by Winte for information concerning Hank Greenspun and the layout of his office. Winte inquired of Becher whether Becher was "familiar with the office of Mr. Greenspun, its layout and where its safe [was] positioned." (T. 785).

[4]It was only after the trial that Hunt became available to testify. Hunt's testimony was taken by deposition, and pursuant to leave of Court granted on April 21, 1977, the Hunt deposition was admitted into evidence (R. 795).

REASONS FOR GRANTING THE WRIT

A. Conflicts With the Decisions of This Court

1. Separate Corporations Are Capable of Conspiring in Violation of the Sherman Act

The rulings below undermine the consistent and repeated decisions of this Court, justifiably relied upon by petitioner, which emphatically confirm that common ownership and control of separate corporations do not liberate those corporations from the impact of the Sherman Act. Furthermore, by purposely ignoring the precepts set out in decisions of this Court, the courts below have effectively emasculated this Court's express policy of vigorous enforcement of the federal antitrust laws through private civil damage suits.

In *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947), this Court observed:

> "Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. * * * The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. * * * And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act." (Cites omitted.)

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951), this Court said:

"Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandising unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. * * * The rule is especially applicable where, as here, respondents hold themselves out as competitors." (Cites omitted.)

In *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 598 (1951), this Court stated:

"The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."

And further in *Perma Life Mufflers, Inc. v. Intern. Parts*, 392 U.S. 134, 141 (1968), this Court reiterated:

"There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. *But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.*"

The latest pronouncement by this Court on this issue comes in dicta to its decision in *United States v. Citizens and Southern National Bank*, 422 U.S. 86, 116 (1975) and indicates that the Court has by no means backed away from

its strong position that competing[5] but commonly owned corporations are not immune from the thrust of the antitrust laws:

"This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. 'The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act.' " (Citations omitted.)

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[5]Although the court below found that the hotel casinos operated by the respondent corporations did not compete, the overwhelming and uncontradicted evidence from respondents' own testimony and document shows that they did. For example, Frank Gay testified as follows upon questioning by the Court, Judge Ferguson:

"BY THE COURT:

Q. If I understand your testimony, there are six hotel casinos, one, two, three, four, five, six.

A. In Las Vegas, yes sir.

Q. And your testimony is that each is autonomous except for mutual corporate beneficiality; is that right?

A. Right. Yes, sir.

Q. And I assume that Summa believes in the free enterprise system so that each person competes against the other.

A. That is the intention, to develop their individuality, yes, sir, to that degree we do.

Q. Yes. It has proved to be the best way of doing business.

A. If we're not, we're in serious trouble.

Q. Yes.

A. Because we're probably the biggest free enterprise corporation.

Q. So that the Desert Inn competes with every other casino in Las Vegas.

A. Sure.

Q. It tries to get customers away from the Sands as well as the MGM.

A. Every day

Q. And each has a General Manager, I assume, whatever the title is.

A. Yes, sir.

Q. And this person is in charge of the operation of that hotel casino.

A. Yes, sir. That's correct.

Q. And each hotel casino is on a separate piece of property.

Notwithstanding this consistent, unequivocal and binding authority, it is suggested by the District Court and the Court of Appeals that other courts have a different view. It is suggested that inquiry must be made to determine whether separate corporate entities are "sufficiently independent of each other for their concerted action to raise antitrust concerns." (See Appendix "A," p. 6.)

This Court, however, neither made, required nor suggested any further inquiry beyond separate incorporation in order to determine the conspiratorial capacity of separate entities. If there is to be a departure from the clear and unequivocal holdings of the Supreme Court of the United States, then petitioner respectfully submits that only the Supreme Court of the United States may do so.

The issue involving intra-corporate conspiracies is an important question which is continually being argued in lower courts and will continue to be argued unless a definitive rule of law is now stated. Past decisions by this Supreme Court emphatically justify the filing of a complaint by a plaintiff where there is evidence of conspiracy among two separate corporations, irregardless of central ownership. Other lower court decisions have required further inquiry. If indeed, as has been implied by the District Court in this case, the fact of separate incorporation is to be considered merely form over substance, an anachronism "to be trotted out only when the tax man [comes] to call,"[6] then an antitrust complaint may not be justified at all. The petitioner respectfully submits that neither the lower courts nor litigants should have to speculate as to which rule will be applied in each case.

A. Yes, sir. That's correct.
Q. Separated by some distances except for the Sands and the Castaways which are across the street from each other.
A. Yes, sir. That's correct.
Q. And each General Manager makes certain policies concerning his internal operations.
A. Yes, sir. That's correct.
Q. Hires and fires people?
A. Yes, sir. That is correct.
Q. So for all outside appearances they are independent.
A. For outside appearances, they would appear independent. We exercise under the theory of that mutual beneficiality—" (T. 696-97).

In addition, given the evidence and for purposes of this appeal, in determining whether the lower court's findings concerning competition are clearly erroneous, this Supreme Court need not give deference to the trial court's opportunity to view and judge the credibility of witnesses, since, in this case, the district judge who made the findings of fact did *not* view the live testimony of witnesses.

2. Respondents' Conduct Constitutes A Classic Horizontal Boycott Which Is A Per Se Violation of the Antitrust Laws

The evidence presented at the trial of this case shows that, on April 12, 1976, the respondents ("buyers") agreed to refuse to continue to place advertising with the *Las Vegas Sun* ("seller"). This agreement among competitors constitutes a classic boycott which has been held to be a *per se* violation of the Sherman Act since this Court's decisions in *Fashion Originators' Guild v. FTC,* 312 U.S. 457 (1941) and *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959). Indeed, the exact same conduct perpetrated in Las Vegas in 1952 was thought to be *per se* unlawful by Chief Judge Roger Foley of the United States District Court for the District of Nevada in the earlier case of

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[6]The District Court apparently felt that although separate incorporation could be used to advantage in thwarting the Internal Revenue Service, it was of no consequence when measuring the scope of the antitrust laws. (Appendix "B", p. 15).

Greenspun v. McCarran, 105 F. Supp. 662 (D. Nev. 1952), and therefore no inquiry was allowed as to the business excuse for the agreement.

The Court of Appeals in this case, however, applied the rule of reason standard to the boycott, arguing that an agreement among competitors to adversely affect *the business of another competititor* may not be considered a *per se* violation of the law. (See Appendix "A," p. 10) But even if that proposition be true, which petitioner respectfully submits it is not, in the present case, there is no anticompetitive conduct levelled at a *competitor* of the respondents. The anticompetitive conduct in this case is levelled directly at the *Sun*, a seller of newspaper advertising space. As a result, the Court of Appeals has manifestly applied the incorrect standard by which to measure respondents' conduct.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Dated: April 14, 1980.

Respectfully submitted,
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(Appendices follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 77-2292

Las Vegas Sun, Inc., a Nevada Corporation,
Plaintiff-Appellant,

vs.

Summa Corporation, dba Castaways Casino, Frontier Hotel, and Desert Inn Hotel; Hotel Properties, Inc., dba Landmark Hotel; Hughes Television Network, Inc., dba Sands Hotel; First National Bank of Nevada, dba Silver Slipper; Frank W. Gay; and Chester Davis,
Defendants-Appellees.

[Filed Nov. 15, 1979]

Appeal from the United States District Court
For the District of Nevada

OPINION

Before: DUNIWAY and WALLACE, Circuit Judges, and BLUMENFELD,* District Judge

WALLACE, Circuit Judge:

The Las Vegas Sun, Inc. (the Sun) appeals the district court's refusal to grant money damages and injunctive

*Honorable M. Joseph Blumenfeld, United States District Judge, District of Connecticut, sitting by designation.

relief for alleged violations of section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, section 8 of the Clayton Anti-Trust Act, 15 U.S.C. § 19, and the common law of Nevada. The basis of the Sun's complaint is that various corporations and individuals combined and conspired to ruin the Sun's business by withdrawing their commercial advertising from its newspaper.

The district court held that neither the Sherman Act, the Clayton Act, nor the Nevada common Law had been violated by any of the charged activities. The district court also denied the Sun's motion, pursuant to Rules 38(b)[1] and 39(b), Federal Rules of Civil Procedure, to grant a jury trial on issues raised in the amended complaint and to set aside the Sun's prior waiver of a jury trial. We hold that the district judge ruled correctly on both issues, and therefor affirm.

I

The Sun owns and publishes the *Las Vegas Sun*, one of two major daily newspapers in Las Vegas, Nevada. Its average daily circulation is 38,447; the circulation of its evening competitor, the *Las Vegas Review-Journal*, is 67,921.

The corporations sued, Summa Corporation (Summa), Hughes Television Network, Inc. (HTV), and Hotel Properties, Inc. (HPI), were all owned or controlled by the late Howard R. Hughes, Jr.[2] Through Summa, HTV, HPI, and

[1]The Sun cited only Rule 39(b), yet its motion for jury trial as of right is properly made pursuant to Rule 38(b). We consider the Sun's contentions under each Rule.

[2]First National Bank is sued in its capacity as the Special Administrator of the Hughes estate, whereby it does business as the Silver Slipper Casino, which Hughes held as sole proprietor before his death.

a sole proprietorship in the Silver Slipper Casino, Hughes controlled six hotel-casino resorts in Las Vegas, Nevada. None of these resorts was separately incorporated, and Hughes personally held, in conjunction with various officers and directors of his companies, each casino's gambling license. The district court found that Summa operated all of the Hughes Resorts as divisions, regardless of which of Hughes' corporate entities actually held record title to the respective property. Further, the Hughes Resorts held themselves out to the public as a single business known as "Hughes Resort Hotels" and "Hughes Hotels and Casinos." There was testimony by Frank Gay, the chief executive officer of Summa, that the various hotel-casinos did compete with each other and that Summa encouraged this competition. The district court concluded, however, that the various hotel-casinos were run by Howard Hughes as a single economic unit and did not in fact compete.

The relationship between Summa and the Sun began in May 1967, when Hughes Tool Company (Hughes Tool), Summa's predecessor, and the Sun agreed that Hughes Tool would advance $500,000 to the Sun for prepaid advertising. Hughes Tool was entitled, pursuant to this agreement, to designate any of the Hughes Resorts or other Hughes businesses to draw on this credit for their advertising in the *Las Vegas Sun*.

The district court found that the Sun obtained the $500,000 advance through its close relationship with Robert Maheu, then head of Hughes' Nevada operations. Shortly after the Sun received the advance, Hank Greenspun, the owner of the Sun, who had previously opposed issuance of multiple gambling licenses, testified before the Nevada

Gaming Commission in favor of issuing multiple licenses to Hughes. During 1967 through 1969, Maheu arranged for payments and loans on extremely favorable terms from Summa to the Sun and Greenspun, totaling $11,373,064.45. The day after the largest single payment of these transactions was received, Greenspun "loaned" Maheu $150,000. Maheu has never paid any principal or interest on this "loan."

Hughes fired Maheu in December 1970. Immediately thereafter, the Sun reversed its pro-Hughes editorial policy and began to attack Hughes and his businesses. The Sun's hostile editorial stance, in addition to the approaching exhaustion of the prepaid advertising credit, led Summa's Public Relations Department to review the "cost-effectiveness" of its advertising in both the *Las Vegas Sun* and the *Review-Journal*. This study concluded that the Hughes Resorts' advertising cost $15.83 per thousand paid subscribers if purchased from the *Review-Journal*, and, after eliminating duplication between the two newspapers, cost $47.42 per thousand in the *Las Vegas Sun*. In addition, the head of Summa's Public Relations Department, Robert Bennett, determined that the quality of printing and photographic reproduction was superior in the *Review-Journal*. Nonetheless, Bennett decided to continue advertising in the *Las Vegas Sun* until the prepaid account was exhausted.

On April 12, 1976, the *Las Vegas Sun* carried a front-page article which implied that certain Summa officers, including Frank Gay, had been guilty of forgery and other criminal conduct. By that date the prepaid advertising account had been reduced to a trivial amount. After consultation with Gay, Bennett decided to cancel all Hughes

Resorts advertising in the *Las Vegas Sun* and directed each of the six hotel-casinos controlled by Hughes to cancel any advertising which could be cancelled and to purchase no new advertising space in the *Las Vegas Sun*. The managers of the six hotel-casinos followed Bennett's direction.

The district court found that although Bennett anticipated that his decision to withdraw Hughes Resorts advertising might injure the Sun, Bennett did not act with this effect as his purpose. The court specifically found that Bennett's decision was prompted by legitimate business considerations.

The Sun's business was not ruined by Summa's termination of advertising in the *Las Vegas Sun*. In fact, the district court found that the Sun's revenue and total inches of display advertising increased in each month after April 1976.

II

The Sun's Sherman Act § 1, 15 U.S.C. § 1, and Clayton Act § 8, 15 U.S.C. § 19, claims are each premised on the ground that the six hotel-casinos were separate, competing, business entities. To prove a Sherman Act § 1 violation, the Sun must show that those charged "conspired" to restrain trade. To prove a violation of section 8 of the Clayton Act, the Sun must demonstrate that the two individual defendants, Gay and Chester Davis, Summa's chief counsel, were simultaneously acting as directors of corporations which, "by virtue of their business and location of operation," are "competitors." 15 U.S.C. § 19. Because the district court's findings that the corporations involved neither competed among themselves, nor were separate entities

capable of "conspiring" are not clearly erroneous, we hold that both the Sherman Act and the Clayton Act claims must fail.

A.

We have stated:

> The Supreme Court repeatedly has held that "common ownership and control does not liberate [two separately incorporated subsidiaries within the same corporate family] from the impact of the antitrust laws . . . especially . . . where [they] hold themselves out as competitors." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951). *Accord, Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 625 (9th Cir. 1977). Nevertheless, "the mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 456 (9th Cir. 1979). *See Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). To "conspire" within the meaning of the Sherman Act, corporate entities within a single organization must be sufficiently independent of each other for their concerted action to raise antitrust concerns. *See id.; Harvey v. Fearless Farris Wholesale, Inc., supra*, 589 F.2d at 455-58. To determine whether corporate entities are separate enough to be capable of conspiracy, a court must examine the particular facts of the case before it. *Mutual Fund Investors*

v. Putnam Management Co., 553 F.2d at 625-26; *Knutson v. Daily Review, Inc.*, 548 F.2d at 802. If the intra-enterprise entities "hold themselves out as competitors," the rule that they cannot avoid Sherman Act liability by hiding behind their common ownership and control is "especially applicable." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951).[3]

We have considered the problem of intra-enterprise conspiracy under the antitrust laws on two recent occasions. In *Knutson v. Daily Review, Inc., supra*, a parent corporation and its wholly-owned subsidiary published several newspapers. A single individual controlled the parent, headed each of its subsidiary corporations, and served as publisher of all the newspapers. In dicta, we held that the lack of intra-enterprise competition between the defendant corporations, coupled with their common ownership and direction by a single individual, "[a]rguably," 548 F.2d at 803, made the corporations legally incapable of conspiracy under the Sherman Act. In *Harvey v. Fearless Farris Wholesale, Inc., supra*, 589 F.2d 451, we held that no Sherman Act § 1 violation occurred when an individual who wholly owned and controlled a gasoline wholesaling company and five

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[3]Commentators, speculating that justifiable reliance may be the theoretical underpinning for the "holding out" theory announced in *Kiefer-Stewart*, have wondered at the absence of a showing of reliance in that case. *See* Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 37 (1968); Note: *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717, 735 (1977). Even if such reliance is the basis of the "holding out" theory, however, the Sun clearly did not rely on the hotel-casino's competitiveness to generate advertising in its paper; the prepaid, common account instituted by Maheu for all the Hughes-controlled businesses indicates quite the opposite: that the Sun's business with the Hughes Resorts derived from Maheu's common control.

retail gasoline outlets refused to sell gasoline to seven unaffiliated retail customers. We first pointed out that a common director or officer cannot "with antitrust impunity make decisions on behalf of two or more corporations, where those corporations have antitrust significance as separate economic units." *Id.* at 458. Yet because the controlling individual was solely responsible for the decision to cut off sales to the unaffiliated gasoline retailers, and his corporations did not compete, we found that the corporate entities were not economic units capable of conspiracy under Section 1. That termination of gasoline deliveries to the unaffiliated retailers was actually implemented by an agent of the controlling individual was deemed irrelevant; it being "fundamental that an agent cannot conspire with his principal." *Id.* at 457.

It is undisputed in the instant case that Bennett made a unilateral decision on Summa's behalf to terminate all advertising in the *Las Vegas Sun,* which decision was forthwith implemented by personnel at each of the six hotel-casinos. The district court found that the Hughes Resorts hotel-casinos neither competed with each other nor represented themselves as competitors. These findings are not clearly erroneous. *See United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). The hotel-casinos represented themselves to the public as a single business entity, Hughes Resorts. Each of the six hotel-casinos paid for their advertising out of the common Summa prepaid advertising account. Thus, the Sun essentially dealt with a single economic entity. Bennett's decision, as Summa's Public Relations Director, to exhaust and not replenish the prepaid account, was a unilateral and thus not concerted refusal to

deal with the Sun. As in *Harvey,* we deem it irrelevant that Summa's agents, the managers of the six casinos, actually implemented the decision. We agree with the district court that there was no Sherman Act violation.

B.

Because the Hughes Resorts operated as a single economic entity and not as competitors, the presence of common directors on the boards of the three controlling corporations (Summa, HTV, and HPI) does not violate section 8 of the Clayton Act. Corporations are "competitors" for purposes of section 8 only if "elimination of competition by agreement between them," 15 U.S.C. § 19, would constitute an antitrust violation. *In re Penn Cent. Sec. Litigation,* 367 F. Supp. 1158, 1168 (E.D. Pa. 1973); *United States v. Sears, Roebuck & Co.,* 111 F. Supp. 614, 615, 620 (S.D.N.Y. 1953). The language of section 8 presumes that the allegedly interlocking corporations are competitors, *i.e.,* presently competing. The evil sought to be avoided is the lessening of that competition. Clearly, where competition doest not exist, the statute cannot apply.

III

Even assuming that defendants were capable of conspiring, there still could be no Sherman Act violation based on the facts of this case. Not all agreements between competitors to cease dealing with a third party are *per se* "in restraint of trade" within the meaning of section 1 of the Sherman Act. *Neeld v. National Hockey League,* 594 F.2d 1297, 1299-1300 (9th Cir. 1979); *Ackerman-Chillingworth v. Pacific Elec. Contractors Ass'n,* 579 F.2d 484, 490 n.7 (9th Cir. 1978), *cert. denied,* 99 S.Ct. 872 (1979); *Bridge*

Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1369-70 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). Where an agreement between competitors "having a primary purpose and direct effect of accomplishing a legitimate business objective is also alleged to have had an incidental and indirect adverse effect upon the business of some competitors," *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1003 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the agreement is tested under the "rule of reason." *Id.* at 1003 n.2. *See Neeld v. National Hockey League, supra*, 594 F.2d at 1299-1300; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra*, 416 F.2d at 76-80. *See also Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977) ("*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."). The district court found that Summa's action by Bennett to terminate its advertising account with the *Las Vegas Sun* was motivated by legitimate business considerations and had an insignificant effect on the Sun's business. Summa had apparently decided that it could advertise more cheaply and effectively in the Sun's competitor, the *Review-Journal*. We see no reason to disturb the district court's finding. Thus, the alleged agreement among the six hotel-casinos controlled by Summa to cease dealing with the Sun must be tested under the "rule of reason."

The case before us is not unlike several recent cases in which we have applied the rule of reason and found no

Sherman Act § 1 violation. In *Cartrade, Inc. v. Ford Dealers Advertising Ass'n*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972), we found that the Ford Motor Company and Ford Dealers Advertising Association could in good faith believe that reducing the number of "cartraders" used by the dealers from two to one would reduce expense and wasted dealer time and thus increase profits. Because we could think of "innumerable reasons" why the various dealers might have become dissatisfied with the terminated car trading company, and because we found no anticompetitive effect other than the terminated company's own loss of business, we found no antitrust violation. We stated: "To find liability here would be to saddle the dealers with Cartrade's services forever." *Id.* at 294.

In *Neeld v. National Hockey League, supra*, 594 F.2d at 1300, and *Bridge Corp. of America v. American Contract Bridge League, Inc., supra*, 428 F.2d at 1370, we upheld hockey and bridge league regulations designed to facilitate play in the respective activities. In each case we found a legitimate justification for the regulations, and only an incidental effect on business competition. In *Neeld* we pointed out that any anticompetitive effect of the regulation prohibiting one-eyed players from competing in the National Hockey League was at most *di minimis*, and incidental to the primary safety purpose of the regulation. *Neeld v. National Hockey League, supra*, 594 F.2d at 1300.

As indicated above. we accept the district court's findings that Bennett's termination of the Sun advertising account that neither an anticompetitive purpose nor a

significant anticompetitive effect. Bennett's decision was supported by a legitimate business justification: economizing on advertising in the Las Vegas area. The district court specifically rejected the Sun's allegation that Summa sought to change the Sun's editorial policy. Because there was neither an anticompetitive purpose nor any significant anticompetitive effect, Summa's action did not violate the "rule of reason." Hence, even assuming that the various Hughes Resorts were capable of intra-enterprise conspiracy, no Sherman Act § 1 violation occurred.

IV

Our conclusion that the district court's finding that Bennett's decision to terminate the Hughes Resorts' advertising in the *Las Vegas Sun* was supported by legitimate business motives was not clearly erroneous also disposes of the Sun's claim under Nevada common law. The leading case relied upon by the Sun, *Short v. Hotel Riviera, Inc.*, 378 P.2d 979, 982, 79 Nev. 94 (1963), illustrates that a malicious concerted refusal to deal is actionable. But where, as here, the refusal to deal is motivated by a legitimate business justification, it is privileged. *Cf. Lewin v. St. Joseph Hosp. of Orange,* 82 Cal. App. 3d 368, 394, 146 Cal. Rptr. 892, 908 (1978); *Widdows v. Koch,* 263 Cal. App. 2d 228, 236, 69 Cal. Rptr. 464, 469 (1968).

V

We now turn to the Sun's last contentions: (1) that it was entitled as of right to a jury trial on new issues raised in its amended complaint, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure; and (2) that the district

court denial of its motion for a jury trial pursuant to Rule 39(b) was an abuse of discretion.

The additional claims alleged in the amended complaint were the Clayton Act § 8 and the Nevada state common law claims. The gist of the Sun's argument is that the additional claims created new issues within the meaning of Rule 38(b).[4] Yet neither the Clayton Act nor the pendent state law claim involves significantly different issues of fact[5] from the claims stated in the original complaint. The Sun's Sherman Act and Clayton Act claims share the determinative issue of whether the six hotel-casinos controlled by Summa "conspired" or were "competitors" with each other. The pendent claim and the Sherman Act claim share and hinge entirely on the absence of a legitimate business justification for Bennett's termination of the Sun advertising account. Thus, the issues in the original complaint and the amended complaint turn on the same matrix of facts. Although the Sun added new legal theories of recovery in its amended complaint, the factual allegations underlying all of its claims are that the charged corporations and individuals conspired to terminate their advertising accounts with the Sun for an anticompetitive purpose. In *Trixler Brokerage Co. v. Ralston Purina Co.,* 505 F.2d 1045, 1050 (9th Cir. 1974), we held "that the presentation

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[4]Rule 38(b) states:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

[5]As used in Rule 38(b), the word "issue" refers to issues of fact, not issues of law. *Trixler Brokerage Co. v. Ralston Purina Co.,* 505 F.2d 1045, 1050 (9th Cir. 1974).

of a new *theory* does not constitute the presentation of a new *issue* on which a jury trial should be granted [as of right] under F. R. Civ. P., Rule 38(b)." (Emphasis in original.) We thus find that the Sun was not entitled as of right to a jury on the claims presented in the amended complaint.

Nor do we think that the district court's denial of the Sun's motion for a jury trial was an abuse of discretion. Rule 39(b) provides:

> Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

"The denial of a motion made under [Rule 39(b)] is to be sustained unless an abuse of judicial discretion is shown." *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 675 (9th Cir. 1975) (quoting *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d 447, 449 (9th Cir. 1960)); *Johnson v. Gardner*, 179 F.2d 114, 118 (9th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950). "For this reason appellate courts normally refuse to interfere." *Rutledge v. Electric Hose & Rubber Co., supra* at 675 (quoting *Tomlin, supra*, 282 F.2d at 449); 5 Moore's Federal Practice, 2d ed., ¶ 39.09, p. 716. We do not think interference is warranted here. The issues, particularly that of intra-enterprise conspiracy, were technical and complicated. *See* 9 C. Wright & A. Miller, Federal Practice and Procedure, § 2334, at 120 n.49. It was within the district judge's discretion to decline to substitute jury factfinding for his own.

AFFIRMED.

Appendix B

United States District Court
District of Nevada

No. C-LV 76-77 SC

Las Vegas Sun, Inc., a Nevada corporation,

Plaintiff,

vs.

Summa Corporation, dba Castaways Casino, Frontier Hotel, and Desert Inn Hotel; Hotel Properties, Inc., dba Landmark Hotel; Hughes Television Network, Inc., dba Sands Hotel; First National Bank of Nevada, dba Silver Slipper; Frank W. Gay; and Chester Davis,

Defendants.

[Filed May 23, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff seeks money damages and injunctive relief against defendants for alleged violations of section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, section 8 of the Clayton Anti-Trust Act, 15 U.S.C. § 19, and the common law of Nevada. The gravamen of plaintiff's complaint is that the defendants combined and conspired to run the plaintiff out of business.

Plaintiff alleges that by reason of the defendants' interlocking directorates they were in a position to form an agreement to violate the antitrust laws; that the defendants did, in fact, use their position to enter into a conspiracy or combination to unreasonably restrain trade by cancelling advertising in plaintiff's newspaper, the *Las Vegas Sun;* and that defendants intentionally, maliciously and in bad faith sought and seek to destroy plaintiff's newspaper, with the result that the *Sun's* competitor, the *Las Vegas Review-Journal,* will acquire a monopoly.

The court's jurisdiction is based on the Clayton Anti-Trust Act §§ 4, 16, 15 U.S.C. §§ 15, 26, and the court's pendant jurisdiction.

FINDINGS OF FACT

1. Plaintiff Las Vegas Sun, Inc., owns and publishes the *Las Vegas Sun,* one of the two major daily newspapers of general circulation published in Las Vegas, Nevada. The founder, controlling stockholder and publisher of the *Sun,* is Hank M. Greenspun. At the time this action arose, the Greenspun family also controlled a billboard company.

2. The *Sun* is distributed through street sales in Las Vegas and by mail throughout the State of Nevada; daily copies of the *Sun* are distributed by mail to forty-eight states of the United States and to many foreign countries; the *Sun* subscribed to and receives international and national news services, sports wire and news services, and nationally distributed columns, features, comics and cartoons originating outside of Nevada; news originated by the *Sun* is transmitted nationally through the different wire services; and the newsprint, ink and supplies necessary

for the production and publication of the *Sun* are purchased from manufacturers and suppliers from many states of the United States and from foreign countries.

3. The *Sun's* average daily circulation, according to the most recent audit, is 38,447. The circulation of its evening competitor, the *Las Vegas Review-Journal,* is 67,921.

4. All of the defendant corporations, with the exception of First National Bank of Nevada, were owned, directly or indirectly, by the late Howard R. Hughes, Jr. First National Bank (FNB) is the Special Administrator of the estate of Mr. Hughes, and in that capacity does business as the Silver Slipper Casino, which Hughes held as sole proprietor before his death. Hughes also was the sole stockholder of Summa Corporation (Summa) and Hughes Television Network, Inc. (HTV). HTV, in turn, wholly owned Hotel Properties, Inc. (HPI).

5. Through various fees and leasehold interests, Hughes controlled six hotel-casino resorts in Las Vegas, Nevada, namely, the Frontier, Desert Inn, Sands, Landmark, Castaways, and Silver Slipper (Hughes Resorts). None of the Hughes Resorts was separately incorporated. Hughes himself held the gambling licenses of these casinos, usually in conjunction with the officers and directors of his companies, but left the operation of them to Summa. The following table illustrates the ownership, lessees, and licensees for each hotel-casino:

Hotel-Casino	Owner	Lessee	Licensee
Frontier	Summa	—	Howard R. Hughes, Jr Officers of Summa Directors of Summa
Desert Inn	Desert Inn Assoc.	Summa	Howard R. Hughes, Jr Officers of Summa Directors of Summa
Sands	HTV	Summa	Howard R. Hughes, Jr Officers of Summa Directors of Summa
Landmark	Summa	HPI	Howard R. Hughes, Jr Officers of HPI Directors of HPI
Castaways	HPI	Summa	Howard R. Hughes, Jr Officers of Summa Directors of Summa
Silver Slipper	Summa or FNB	—	Howard R. Hughes, Jr

6. Summa directed and provided management services to the Hughes Resorts through its Recreation Group. Internally, Summa operated all of the Hughes Resorts as divisions regardless of which business entity held record title to the property. Externally, the Hughes Resorts held themselves out to the public as a single business known as "Hughes Resort Hotels" and "Hughes Hotels and Casinos."

7. Each hotel-casino is a large and luxurious establishment, with dining rooms, bars, shops and rooms for gambling. Each receives the major portion of its business from tourists originating outside of the State of Nevada.

8. The individual defendants, Frank W. Gay and Chester C. Davis, are the chief executive officer and general counsel of Summa, respectively. Each serves on the board of directors of both Summa and HPI. Mr. Gay also is an officer of HPI.

9. The Hughes companies and buildings were run as a single economic unit by Howard Hughes, when he chose to take an interest, and at all other times by designated chief executive officers and their deputies. Corporate distinctions routinely were ignored when they did not serve the personal interests of Hughes. Although the Hughes Resorts and their corporate owners ostensibly were in competition with each other, they functioned as a single economic entity and did not compete in fact.

10. For purposes of the antitrust violations charged, the relevant market is the Las Vegas hotel-casino entertainment advertising market, and the relevant product is entertainment advertising space.

11. None of the defendants is in the daily newspaper publishing business, nor in the business of selling entertainment advertising space. Defendants are, for purposes relevant here, in the business of providing hotel-casino entertainment, and in the course of this business regularly purchase related entertainment advertising space.

12. Plaintiff is not in the hotel-casino entertainment business, but rather in the newspaper publishing billboard business. In the course of this business, it regularly offers advertising space for sale.

13. Plaintiff and defendants are not competitors, directly or indirectly.

14. The Hughes Resorts' shares of advertising in 1975 in plaintiff's newspaper was less than 1.8 percent of the total display advertising in that newspaper. The Hughes Resorts' share of advertising in the entire Las Vegas en-

tertainment advertising market is impossible to determine from the facts presented, but was significantly less than 1.8 percent.

15. In 1967, Hughes Tool Company, the predecessor of Summa, began acquiring the Hughes Resorts. On May 15, 1967, Hughes Tool and the *Sun* entered into a letter agreement whereby Hughes Tool advanced $500,000 to the *Sun* for prepaid advertising. Hughes Tool Company, or Summa, as it may be referred to for purposes of convenience, was permitted to designate any entities to receive credit against the prepaid advertising account. Summa designated the Hughes Resorts and other Summa businesses, but not until 1972 did any of the designated entities draw on the credit for their advertising in the *Sun*. The *Sun* maintained a single account for Summa's prepaid advertising; it credited against that one account all advertising placed by the Hughes Resorts.

16. The *Sun* obtained the $500,000 advance through the good offices of Robert Maheu, then head of Hughes' Nevada operations. Mr. Greenspun testified that the purpose of the $500,000 advance was to obtain "good security . . . , to have that kind of hold on them that they have to use our paper." Soon after the *Sun* received the advance, Mr. Greenspun, who had theretofore opposed issuance of more than one gaming license to any single individual, testified eloquently before the Nevada Gaming Commission in favor of issuance of multiple licenses to Howard Hughes. The *Sun* also published articles favoring Hughes' acquisition of his complex of casinos, and adopted a favorable editorial stance that continued for several years.

17. During 1967 through 1969, Mr. Maheu arranged for payments and loans on extremely favorable terms from Summa to Mr. Greenspun and the *Sun* totalling $11,373,064.45. The day after Mr. Greenspun received the largest single payment in those transactions, he "loaned" $150,000 to Mr. Maheu. No payments of principal or interest has been paid by Mr. Maheu to Mr. Greenspun.

18. In December, 1970, Hughes and Maheu had a falling out, and Maheu was fired. Immediately, the *Sun* reversed its laudatory editorial policy and began attacking Hughes and his businesses. Since then, the *Sun* has published a great number of adverse news stories and editorials.

19. Under the stimulus of the *Sun's* critical editorial stance and the approaching exhaustion of the prepaid advertising credit, Summa's Public Relations Department reviewed the cost-effectiveness of advertising in both the *Sun* and the *Review-Journal*. The study included independent marketing surveys, comparison of advertising rates, and consideration of the wishes of the stars appearing at the Hughes Resorts. The head of Summa's Public Relations Department determined that the quality of printing and photographic reproduction was superior in the *Review-Journal*, but nonetheless decided to continue advertising in the *Sun* because to cancel advertising in the *Sun* before the prepaid account was exhausted would not have made business sense.

20. As of January, 1976, display advertising of the type usually purchased by the Hughes Resorts cost $15.83 per thousand paid subscribers if purchased from the *Review-Journal*. After duplication is eliminated, it cost $47.42 per

thousand additional paid subscribers to advertise in the *Sun*. If duplication is ignored, the *Review-Journal's* substantially larger circulation meant that it cost advertisers $27.50 per thousand paid subscribers to advertise in the *Sun* as compared with a rate of $15.83 per thousand paid subscribers if they advertised in the *Review-Journal*.

21. On April 1, 1976, the *Sun* raised its rate for this type of advertising; the *Review-Journal* kept its rates unchanged. Thus, the disparity became even greater than indicated by the statistics above.

22. According to undisputed expert testimony, a normal advertiser would be justified from a business standpoint in advertising in only the less expensive of two daily newspapers. Plaintiff's records indicated that over 200 businesses in Las Vegas had reached the same conclusion, and advertised exclusively in the *Review-Journal*.

23. On April 12, 1976, the *Sun* carried a front-page article which implied that Summa officers had been guilty of forgery and other criminal conduct.

24. As by that date the prepaid advertising account had been reduced to a trivial amount (if advertising already committed for publication is assessed against it), Summa's Public Relations director, Mr. Robert Bennett, decided to resolve the issue of whether or not to continue Summa's policy of carrying Hughes Resorts' advertising in both newspapers. He consulted Mr. Gay, chief executive officer of Summa, and was directed to make his own decision but to consider only the cost-effectiveness of the advertising. As a consequence, he decided to cancel all Hughes Resorts

advertising in the *Sun* and directed each hotel-casino to cancel any advertising which could be cancelled and to purchase no new advertising space in the *Sun*.

25. Summa continued to purchase advertising space in the *Sun* for purposes other than Hughes Resorts entertainment advertising. The Hughes Resorts were permitted to continue advertising through a billboard company controlled by the Greenspun family. Also, each hotel-casino continued to allow sale of the *Sun* on its premises after the cancellation.

26. The decision to cancel was made by Mr. Bennett, without consultation, recommendation or involvement by Hughes, the board of directors of Summa, HPI, or HTV, or anyone else in the Hughes organization, except as previously noted. Although the management of each hotel-casino followed Bennett's orders and did cancel its advertising in the *Sun*, no contract, combination or conspiracy was involved in any way either in the making, or in the implementation, of the decision to cancel. No combination or conspiracy existed at any time pertinent to this matter.

27. In making his decision, Mr. Bennett acted on behalf of Summa exclusively, and thus of Howard Hughes, and for the purpose of advancing the business interests of the Hughes Resorts controlled by Summa.

28. There is no persuasive evidence that Mr. Bennett made the decision to cancel in order to fix prices, to keep competition out of the market, to create a monopoly in a product market, to strengthen further an already dominant market position, or to bring about any other restraint of

commerce. Although it was anticipated that the decision to withdraw future advertising might have an injurious effect on the *Sun,* Mr. Bennett did not act with that effect as his purpose. In particular, the cancellation decision did not stem from any of the articles published in the *Sun,* nor from its editorial policy, nor did it have anything to do with the article and memoranda printed in the *Sun* on April 12, 1976.

29. There was no attempted coercion nor coercion in fact of the *Sun* by Summa or any of the Hughes companies and holdings, nor was there an anticompetitive purpose or effect in the decision to cancel advertising.

30. Despite plaintiff's claim that the withdrawal of this advertising could cause the *Sun* to suffer losses which could lead to its closing, the evidence shows that the newspaper's profits were higher in every month after withdrawal of this advertising, except in August, 1976, when certain questionable "adjustments" to "expenses" created a paper loss. Both revenue and the actual number of inches of display advertising increased in all the months after April, 1976.

31. Any restraint of the entertainment advertising market in Las Vegas, Nevada, occurring as a result of this cancellation, was reasonable.

32. There is no evidence that the *Review-Journal* participated in any way with reference to the cancellation of the *Sun* advertising; it was the innocent beneficiary of the decision to cancel.

DISCUSSION

A. *Count One: Conspiracy in Restraint of Trade.*

Plaintiff's Sherman § 1 claim fails because (1) it lacks standing to bring it; (2) there was no conspiracy; (3) defendants had no anticompetitive purpose; and (4) no unreasonable restraint of commerce occurred.

1. *Lack of standing*

Although private actions to enforce the antitrust laws are permitted, private parties nonetheless must be able to show an injury of a kind which is proscribed by the antitrust laws, and injury distinct from whatever private detriment they may have suffered.

The Sherman Act does not render unlawful all arrangements which may impact adversely on traders, "but forbids only those whose effect 'may be substantially to lessen competition, or to tend to create a monopoly' 'in any line of commerce in any section of the country.'" *Brown Shoe Co. v. United States,* 370 U.S. 294, 324 (1962).

> [I]t is the public interest which is protected by the Act. The right of an individual to sue for a private injury is conditioned upon and limited by the presence in the circumstances of a public detriment or injury, without which, although there may exist on actionable wrong, the individual's right to redress cannot be asserted. . . .

District of Columbia Citizen Publishing Co. v. Merchants & Manufacturers Association, 83 F. Supp. 994, 997 (D.D.C. 1949); *cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* ..... U.S. ..... (1977).

To meet this requirement, plaintiff claims that defendants agreed to restrain trade by cancelling advertising in plaintiff's newspaper with the result that competition may be impaired by the destruction of plaintiff's newspaper business, and a monopoly created.

But in support of this claim of nefarious intent and illegal result, plaintiff can show no injury; the facts do not bear out its estimate of the impact of defendants' alleged conspiracy. Certainly, plaintiff has not been actually injured. The *Sun's* advertising space sales increased after the cancellation; its advertising revenue increased; its profits increased. Nor is there any evidence of potential injury to plaintiff. All that plaintiff can show is the loss of a customer's patronage, a circumstance which is one of the normal hazards of business. It is difficult to perceive how plaintiff may be heard to complain of this "injury", where, as here, plaintiff possessed no right to the continued purchase of advertising space by defendants. The loss of anticipated revenue from the Hughes Resorts may constitute an actionable injury for certain purposes, but it does not suffice here to support the antitrust claims made.

Similarly, the public interest has not been injured or threatened with injury. The *Sun's* advertising space continues to be available to the public; the *Sun* is in no imminent danger of becoming defunct by reason of defendants' action; the advertising space previously purchased from the *Sun* continues to be purchased from other Las Vegas advertising media; the Las Vegas entertainment advertising market is not impaired, nor is competition within it restrained by defendants, either actually or potentially. Indeed, there is some evidence suggesting that the loss of

the Hughes Resorts advertising spurred the *Sun* to improve its production capabilities, with the result that its ability to compete actually may have been enhanced indirectly.

The private detriment shown is at best somewhat speculative; no injury to the public interest exists, actually or potentially. If a conspiracy exists, and the court finds below that it does not, it is toothless. Under the circumstances of this case, plaintiff lacks standing to be heard. *See, e.g., Warth v. Seldin,* 422 U.S. 490, 498-502 (1975); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130 (1969); *Muskin Shoe Co. v. United Shoe Machinery Corp.,* 167 F. Supp. 106, 111 (D. Md. 1958); *Gomberg v. Midvale Co.,* 157 F. Supp. 132, 141 (E.D. Pa. 1955); *District of Columbia Citizen Publishing Co. v. Merchants & Manufacturers Association, supra.*

2. *Lack of conspiracy*

Assuming that plaintiff does have standing, it still is true that to make out a conspiracy, two distinct economic entities must agree. Plaintiff relies on language in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F. 2d 71 (9th Cir. 1969), and other cases, to the effect that incorporated subsidiaries of a parent corporation are capable of conspiring. Defendants riposte that such statements mark but the beginning of the court's enquiry, and not its end.

The court agrees. While it is correct to say that those who take on the advantages of corporate status also must assume its liabilities, it is quite another thing to conclude that because an owner is obliged to respect corporate for-

malities and treat each owned corporation with separate consideration, that a conspiracy or combination must exist perforce where the officers of his subsidiary corporations do as instructed to carry out his plan.

"Antitrust law is concerned with the concerted action of distinct economic entities"; "whether such action has occurred turns on the particular facts." *Knutson v. Daily Review, Inc.*, 548 F. 2d 795, 802 (9th Cir. 1976). Among these facts, separate incorporation is just one of many: it may be significant in an antitrust sense or it may be only a technicality. *Id.*

> The fact that the complaint alleges the defendants to be related entities is not by itself of special significance; rather, whether such entities are in fact mere instrumentalities of a single commercial unit, incapable of conspiring or combining with their parent, or separate units, capable of violating Section 1, will turn upon the independence of action enjoyed by the companies, the extent to which they are mutually owned and controlled, the degree, if any, to which they compete with one another or are held out to do so, and whether any of them were specifically incorporated or controlled to effect anticompetitive purposes.

Brager & Co., Inc. v. Leumi Securities Corp., 1977-1 TRADE REG. REP. (CCH) ¶ 61,379, at 71,371-2 (S.D.N.Y., April 12, 1977).

Thus, although an owner or officer of a parent corporation who abuses corporate formalities may open himself to suit by shareholders or others who are injured thereby, he does not expose himself to a successful charge of antitrust conspiracy except but that an agreement between two

separate economic entities be proved. The mere fact that directors or officers of subsidiaries give up their responsibilities to do his bidding does not prove a conspiracy where in fact the group of corporations form a single economic unit.

This is such a case. The late Howard Hughes was notorious for his iron-clad personal management and control of his companies. They did his bidding—in fact, if not in form—and that of such executive operations officers as had his confidence. An order from such an officer was regarded as that of Hughes himself, and was obeyed throughout his organization, whatever its peculiarity or outrage to corporate forms.

At the time the conspiracy charged is alleged to have arisen, defendant Gay acted as Hughes' chief operations officer and controlled the Hughes companies through his position as an officer and director of Summa. It is a fact that Mr. Gay set policy, either personally or through lieutenants, and that the officers of the various corporations owned by Hughes hastened to conform. Despite the legal separateness of these units, they functioned as mere subdivisions within the single economic entity which was the Hughes financial empire. The "veils" which should have covered their operations with a more pleasing decorum were not simply pierced, but shredded. The rags remaining were trotted out only when the taxman came to call.

Plaintiff may well complain of this practice, but that it existed it does not seriously dispute. Rather, it asks the court to certify on an *ex poste facto* basis the decency of

the Hughes' corporate relationships, and therefrom find true the improper combination it alleges.

But the facts will not bear it out. No conspiracy or combination existed, because two separate economic units never existed and thus could not agree. The acts of which it complains were done at the instigation of an officer of one sub-unit, Summa, which by virtue of Mr. Gay's unique status enjoyed actual control of the Hughes group of companies, whether directly owned by Summa or not. All of the corporate defendants were owned by Hughes; none enjoyed real independence of action or competed with one another. The hotel-casinos were not even held out to be competitors, but were operated jointly by Summa. Together, the Hughes holdings constituted a single economic unit.

3. *Lack of anticompetitive purpose*

These facts, taken alone, might suggest that Summa's control was intended to effect an anticompetitive purpose. But the evidence, considered in its totality, reveals a relationship based on purposes far more complex than a simple vendetta against the *Sun*. Most of them had to do with money, and money as assessed in terms of the benefit to Hughes and his companies, not secondary injury to others.

The decision to cancel advertising in the Sun was made in the exercise of sound business judgment, and for proper business purposes. It is well established that a trader may discontinue a relationship, or refuse to open a new relationship, for business reasons which are sufficient to him, and the adverse effect on the rejected party is immaterial in the absence of any arrangement restricting trade or compe-

tition. *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971). It is only when he

> goes beyond his personal right, and conspiring and combining with others of like purposes, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by . . . coercive influence . . . , [that] he exceeds his lawful rights. . . .

Eastern States Retail Lumber Dealers Association v. United States, 234 U.S. 600, 614 (1914); *see Associated Press, Inc. v. United States*, 326 U.S. 1 (1945); *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045 (9th Cir. 1974).

Defendants did not go beyond their lawful rights. They did not act for anticompetitive purposes.

4. *Lack of unreasonable restraint of trade*

Assuming that defendants have standing and could conspire and combine, it still does not follow here that they sought or accomplished an unreasonable restraint. *Id.; see Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra.*

Group boycotts, generally speaking, are *per se* restraints of trade, the principle being that it is prima facie unreasonable for a dominant group to combine to coerce. *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); *see Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941). But where the purpose to coerce trade policy or to remove competition is absent, the policy question is more difficult, for the combination may simply be engaged in a

"normal and usual agreement" and not a prohibited agreement. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra; see Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

Thus, the rule that there are no exceptions to the rule that group boycotts are *per se* illegal is beginning to erode:

> [The rule] seems sensible if [it refers] to true boycotts: concerted refusals to deal undertaken for the purpose of coercing the object of the boycott to accede to the action or inaction desired by the group or with the purpose or effect of excluding a competitor of a group member from competition. On the other hand, there is a growing awareness in the lower courts that many so-called "refusals to deal" cases are not boycotts at all, but are simply the inevitable result of legitimate business decisions. This is especially true where a parent and subsidiary have engaged in the complained-of conduct.

Media Networks, Inc. v. AT&T Co., 1976-1 TRADE REG. REP. (CCH) ¶ 60,780 (D. Minn., January 27, 1976) (citations omitted), *discussing* ABA, ANTITRUST DEVELOPMENTS 1955-1968, at 11 (1968).

Essentially, it can be said of the *per se* group boycott cases that the defendants' conduct was so pernicious, either in purpose or inevitable effect, that an otherwise legitimate goal of the combination could not suffice to save it. *Media Networks, Inc. v. AT&T, supra; see Worthen Bank & Trust Co. v. National BankAmericard, Inc., supra.* This is not such a case.

No "exclusionary purpose or effect" or "lack of legitimate competitive purpose" is obvious from the nature of the action or the evidence. The agreement to withdraw hotel-casino advertising from the *Sun*, if any legally can exist, was "necessary and reasonable" and ancillary to a legitimate main agreement to accomplish a lawful business objective, i.e., to increase the profits of the hotel-casinos by shifting their advertising to a more cost-effective newspaper. *See Media Networks, Inc. v. AT&T Co., supra; Chastain v. AT&T Co.*, 1975-2 TRADE REG. REP. (CCH) ¶ 60,519 (D.D.C., Oct. 1, 1975); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (2 pts.), 74 YALE L.J. 775 (1965), 75 YALE L.J. 375 (1966). Accordingly, as no *per se* restraint is involved, the court must apply the "rule of reason" to determine whether the restraint, such as it was, was unreasonable.

The facts show that a new officer of Summa with responsibility for public relations undertook to review the cost-effectiveness of the hotel-casinos' advertising practices, examined facts and opinions pertinent to that review, and concluded that it would be in the business interests of the hotel-casinos, and, therefore, of Hughes, to terminate advertising in the *Sun*. It was a reasonable conclusion reasonably made, and whatever restraint of trade followed from it was reasonable within the special antitrust meaning of that term.

B. *Count Two: Interlocking Directorates*

Plaintiff's Clayton § 8 claim fails because (1) it lacks standing to bring it, and (2) the corporations of which defendants are directors are not competitors.

1. *Lack of Standing*

The views expressed on this issue with respect to plaintiff's Sherman § 1 claim equally apply here. Moreover, particularly where a private plaintiff seeks to utilize the remedial function of section 4 of the Clayton Act to enforce a prophylactic measure such as section 8, the private party

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury of the type the antitrust laws were intended to prevent and that flow from which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violation . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra at ....., 50 L.ed 2d at 712 (emphasis in original).

Plaintiff claims that defendants' interlocking directorates enabled them to agree and to effect a restraint of trade by cancelling their advertising, with possible anticompetitive effects as described heretofore. But, as also discussed, the facts do not support their claim.

What we have here is simply a case of a conglomerate but single economic unit, in the exercise of lawful functions and for the benefit of its owner, declining to advertise in plaintiff's newspaper. No adverse impact on competition has been shown to follow as a natural result of this cancellation, nor has an antitrust injury either to plaintiff or the the public interest been established. Plaintiff, therefore, lacks standing to be heard.

2. *Lack of interlocking competitors*

The corporations of which defendants Gay and Davis are directors, Summa and HPI, are not competitors. The separate hotel-casinos operated by each corporation were operated as parts of a single economic unit by Summa and did not compete with each other. Nor were they held out to the public to be competitors, being collectively identified to the public as the "Hughes Resort Hotels" and the "Hughes Hotels and Casinos."

As they were not competitors, there could be no elimination of competition between them, let alone an elimination of competition violative of the antitrust laws. Further, as they were not competitors, it was not unlawful under section 8 of the Clayton Act for defendants Gay and Davis to be directors of both corporations. *See United States v. Sears, Roebuck & Co.,* 111 F. Supp. 614 (S.D. N.Y. 1953).

C. *Count Three: Conspiracy to Obstruct and Interfere with Business*

Nevada law permits a tort having the characteristics of the tort alleged in this count, *Short v. Hotel Riviera, Inc.,* 79 Nev. 94 (1963), but plaintiff has failed to distinguish it from the tort alleged in count four, intentional interference with business relationships. The latter tort is general in scope; the former is simply a special application. Business relationships may be interfered with by many improper methods, of which conspiracy and combination are but egregious examples.

As plaintiff cannot recover twice for the same tort, this count will be treated as cumulative to that alleged in count

four, and will be dismissed. Assuming that it is not cumulative, plaintiff has failed to prove the existence of a conspiracy.

D. *Count Four: Intentional Interference with Business Relationships*

The law in this area is ill-defined, but adequate to establish this as a proper intentional tort. *Short v. Hotel Riviera, Inc., supra.* The wrong consists of intentionally diverting or taking business from another by improper methods not within the privilege of fair competition.

Contrary to defendants' contention, interference with an existing contract is not required to make out a right to recovery. Rather, the tort is concerned with interference with business relationships or advantages which are merely prospective. Intentional interference with a contractual relationship is a separate tort. *Cf.* 4 *B. Witkin, Summary of California Law Torts* § 380 *et seq.* (1974).

The elements of this tort are (1) intent; (2) improper modes of conduct; (3) interference with business relationships; (4) "but for" causation; and (5) injury. Plaintiff has established that it suffered injury sufficient for purposes of this tort in that it lost the prospective advantage of a contract or profit deriving from the advertising space it otherwise may have sold to defendants' hotel-casinos. It has established causation, in that but for defendants' decision to cancel this advertising, there was a reasonable probability that a contract or profit would have been obtained. It is clear that defendants acted intentionally when they cancelled advertising in the *Sun*. But plaintiff has

failed to show that defendants' action was improper in any respect.

Where a party has a financial interest in a business, it ordinarily cannot be found that decisions made with respect to that business and for the purpose of furthering that business are improper. Although causing the hotel-casinos to cease advertising in the *Sun* injured plaintiff's prospects, the injury is protected by the privilege of fair competition. It is fundamental to the notion of private ownership and control of businesses that the owner may control his businesses and their commercial relationships to his own advantage, whether or not another business is adversely affected thereby, so long as he does not act illegally or through a means proscribed by public policy. *Cf. Shida v. Japan Food Corp.*, 251 Cal. App. 2d 864 (1967).

Here, the owner's agents controlled the hotel-casinos to maximize their profitability for the owner's advantage. They in no sense acted improperly or to effect any illegal restraint of trade or for any purpose beyond the objective of advancing the owner's interests. Plaintiff, therefore, cannot recover, as there was no tortious act.

CONCLUSIONS OF LAW

1. Plaintiff lacks standing to bring an antitrust claim under section 1 of the Sherman Anti-Trust Act or section 8 of the Clayton Anti-Trust Act.

2. The Hughes companies and holdings, which include defendant corporations and the Hughes Resorts, were a single economic entity owned by one man and, so far as pertinent here, managed by Summa and its officers.

3. As such, no conspiracy in violation of section 1 of the Sherman Anti-Trust Act could or did exist, as a single economic entity cannot conspire with itself.

4. Defendants had no anticompetitive purpose in cancelling their entertainment advertising in the *Sun*, nor did their action tend to create a monopoly, or to lessen competition within the relevant market (the Las Vegas hotel-casino entertainment advertising market), or to produce any other evil proscribed by the antitrust laws.

5. Defendants did not act unreasonably to restrain trade or commerce; any restraint of the entertainment advertising market in Las Vegas, Nevada, occurring as a result of their cancellation of advertising in the *Sun* was reasonable.

6. As the corporations which defendants Gay and Davis served as directors were not competitors, defendants did not violate section 8 of the Clayton Anti-Trust Act.

7. The tort of conspiracy to obstruct and interfere with business, in the form alleged, is cumulative to the tort of intentional interference with business relationships.

8. Defendants did not tortiously interfere with plaintiff's business or business relationships.

To the extent that any finding of fact herein is or should be a conclusion of law, or any conclusion of law is or should be a finding of fact, or any part of the discussion contained herein should be listed either as a finding of fact or as a conclusion of law, it is hereby so designated.

Counts one and two are dismissed with prejudice to the extent that plaintiff lacks standing to bring them; judgment is rendered for defendants to the extent that the counts are properly before the court.

Count three is dismissed with prejudice because it is cumulative to count four. To the extent it is not cumulative, judgment is rendered for defendants.

Judgment is rendered for defendants on count four.

Plaintiff and defendants shall each bear their own costs and fees.

Dated: May 20, 1977.

/s/ Samuel Conti

United States District Judge

United States District Court
District of Nevada

No. C-LV 76-77 SC

Las Vegas Sun, Inc., a Nevada corporation,

Plaintiff,

vs.

Summa Corporation, dba Castaways Casino, Frontier Hotel, and Desert Inn Hotel; Hotel Properties, Inc., dba Landmark Hotel; Hughes Television Network, Inc., dba Sands Hotel; First National Bank of Nevada, dba Silver Slipper; Frank W. Gay; and Chester Davis,

Defendants.

[Filed May 23, 1977]

JUDGMENT

It is hereby ordered, adjudged and decreed as follows:

Counts one and two are dismissed with prejudice to the extent that plaintiff lacks standing to bring them; judgment is rendered for defendants to the extent that the counts are properly before the court.

Count three is dismissed with prejudice because it is cumulative to count four. To the extent it is not cumulative, judgment is rendered for defendants.

Judgment is rendered for defendants on count four.

Plaintiff and defendants shall each bear their own costs and fees.

The foregoing judgment is rendered in accordance with the matter contained in the court's Findings of Fact and Conclusions of Law filed herein.

Dated: May 20, 1977.

/s/ Samuel Conti

United States District Judge

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 77-2292

Las Vegas Sun, Inc., a Nevada Corporation,
Plaintiff-Appellant,

vs.

Summa Corporation, dba Castaways Casino, et al.,
Defendants-Appellees.

[Filed Jan. 17, 1980]

ORDER

Before: DUNIWAY and WALLACE, Circuit Judges, and BLUMENFELD,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable M. Joseph Blumenfeld, United States District Judge, District of Connecticut, sitting by designation.

Supreme Court, U.S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1626

LAS VEGAS SUN, INC.,

Petitioner.

vs.

SUMMA CORPORATION, dba CASTAWAYS CASINO, FRONTIER HOTEL, and DESERT INN HOTEL; HOTEL PROPERTIES, INC., dba LANDMARK HOTEL; HUGHES TELEVISION NETWORK, INC., dba SANDS HOTEL; FIRST NATIONAL BANK OF NEVADA, dba SILVER SLIPPER; FRANK W. GAY; and CHESTER DAVIS.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

CORPORATE RESPONDENTS' BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1626

LAS VEGAS SUN, INC.,

Petitioner,

vs.

SUMMA CORPORATION, dba CASTAWAYS CASINO, FRONTIER HOTEL, and DESERT INN HOTEL; HOTEL PROPERTIES, INC., dba LANDMARK HOTEL; HUGHES TELEVISION NETWORK, INC., dba SANDS HOTEL; FIRST NATIONAL BANK OF NEVADA, dba SILVER SLIPPER; FRANK W. GAY; and CHESTER DAVIS,

Respondents.

CORPORATE RESPONDENTS' BRIEF IN OPPOSITION.

The Corporate respondents, Summa Corporation, dba Castaways Casino, Frontier Hotel, and Desert Inn Hotel; Hotel Properties, Inc., dba Landmark Hotel; Hughes Television Network, Inc., dba Sands Hotel; and First National Bank of Nevada, dba Silver Slipper, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 610 F.2d 614.

Statement of the Case.

Petitioner styled this action as an antitrust treble-damage action by making allegations of conspiracy to restrain trade in violation of section one of the Sherman Act (15 U.S.C. § 1).[1] Following a full trial, the District Court entered judgment for the defendants, basing its decision on several alternative grounds. The decision was affirmed in its entirety by the United States Court of Appeals for the Ninth Circuit. Petitioner now seeks a writ of certiorari to again review determinations of both fact and law that have been properly decided twice before.

Petitioner is the Las Vegas Sun, Inc. (the "Sun"), which owns and publishes the *Las Vegas Sun*, a newspaper of general circulation in the area of Las Vegas, Nevada. At the time the District Court rendered its opinion, the most recent audit established that the *Las Vegas Sun's* average daily circulation was 38,447 while that of its chief competitor, the *Las Vegas Review-Journal*, was 67,921.

All of the corporate respondents were owned and controlled by the late Howard R. Hughes.[2] The corporate respondents own resort hotels and casinos (the "Hughes Resorts") which are generally engaged in providing entertainment and leisure activities in the city of Las Vegas. The Hughes Resorts advertise in a variety of media, including newspapers. Their share of the *Las Vegas Sun's* total display advertising during the year 1975 was less than

[1]At the trial and on appeal the petitioner also asserted claims under Section 8 of the Clayton Act (15 U.S.C. § 19) and the common law of the State of Nevada. However, these claims have not been advanced in the petition.

[2]The sole exception is the First National Bank of Nevada which was sued in its capacity as co-special administrator of Howard Hughes' estate. First National Bank is doing business as The Silver Slipper, which Mr. Hughes held as a sole proprietor before his death.

1.8%. (Pet. App. B at 5, Finding No. 14.)[3] Respondents Frank W. Gay and Chester Davis were, at all times relevant to this action, respectively, the chief executive officer and the general counsel of respondent Summa Corporation.

Summa Corporation directed and provided management services for the various resorts through its Recreation Group. One person was assigned to manage all the operations, and management expenses were allocated among the various casinos and hotels. (Ex. DS.) The District Court found that internally the resorts were operated by Summa as divisions and that they held themselves out to the public as a single business known as the "Hughes Resort Hotels" and the "Hughes Hotels and Casinos." (Pet. App. B at 4, Finding No. 6.) Although they were in competition with each other in the sense that they were all engaged in a similar business, the District Court found that they functioned as a single economic entity and did not compete in fact. (Pet. App. B at 5, Finding No. 9.) That finding was amply supported by substantial evidence, including the fact that the corporate respondents regularly advertised themselves collectively as the "Hughes Resort Hotels" (Ex. DK) or one of the "Hughes Hotels." (Ex. DM.) Significantly, even the Sun treated the corporate respondents as a group for purposes of billing them for their advertising purchases. (Ex. BI.)

In May of 1967, Summa (then known as the Hughes Tool Company) and the Sun entered into an agreement whereby Summa advanced $500,000 to the Sun for prepaid advertising in the *Las Vegas Sun*. Summa was permitted to designate which of its businesses, including the Hughes Resorts, would be entitled to draw on the account, and irrespective of which hotel or hotels were the subject of a

[3]"Pet." refers to the petition for writ of certiorari; "Pet. App." refers to the appendices thereto; and "Ex." refers to trial exhibits.

particular advertisement, the Sun charged the Summa account.

The District Court found that the Sun got the $500,000 through the assistance of Robert Maheu, who at the time was head of Hughes' Nevada operations. (Pet. App. B at 6, Finding No. 16.) Over the next several years, Mr. Maheu arranged for Summa to loan, on extremely favorable terms, a total of approximately $11,373,064 to Hank Greenspun, the founder and controlling owner of the Sun. The day after Greenspun got the single largest payment, he "loaned" $150,000 to Maheu. No payment of principal or interest has ever been made. (Pet. App. B at 7, Finding No. 17.) Hughes fired Maheu in December, 1970, and immediately thereafter the Sun began to attack Hughes and his businesses in its editorials. (Pet. App. B at 7, Finding No. 18.)

During the latter part of 1974, Summa analyzed the economic efficiency and business justification for advertising in various media, and in that regard, commissioned and completed a study to review the relative cost-effectiveness of advertising placed in the *Las Vegas Sun* and its competitor, the *Las Vegas Review-Journal*. The study included an independent marketing survey, comparison of advertising rates, and consideration of the desires of the entertainers appearing at the various resorts. (Pet. App. B at 7, Finding No. 19.) Robert Bennett, the head of Summa's Public Relations Department, determined that the quality of the *Las Vegas Sun's* printing and photographic reproduction was inferior. Moreover, it was learned that the cost of reaching 1,000 subscribers by advertising in the *Las Vegas Sun* was nearly twice that of the *Review-Journal*. Taking overlapping readership into account, it was nearly three times as expensive to advertise in the *Las Vegas Sun*. (Pet. App. B at 7-8, Finding No. 20.) The petitioner's own records established that over 200 businesses had reached the same conclusion; it was simply not economically wise to advertise in both newspapers and the *Review-Journal* was a better value. (Pet. App. B at 8, Finding No. 22.) Although there were compelling business reasons for terminating its advertising in the *Las Vegas Sun*, Summa decided to defer the decision until the prepaid account was substantially exhausted.

Notwithstanding the *Las Vegas Sun's* already high rates, on April 1, 1976 it again raised its prices. Then, on April 12, 1976, the *Las Vegas Sun* printed an article implying that Summa officers were guilty of forgery and other criminal misconduct. At that time, the prepaid advertising had been reduced to what the District Court found to be "a trivial amount" (Pet. App. B at 8, Finding No. 24), and Mr. Bennett decided to bring to a head the issue of whether to continue Summa's policy of advertising in both Las Vegas newspapers. After contacting respondent Gay to discuss the matter, he was told to use his own judgment, but to consider only the cost-effectiveness of the advertising. (Pet. App. B at 8, Finding No. 24.) After deliberation, Bennett decided to terminate all future advertising by the corporate respondents in the *Las Vegas Sun* and he directed the appropriate people to implement his decision. The District Court found that, in reaching his judgment, Bennett acted solely on behalf of Summa, for the purpose of advancing its legitimate business interests and without any injurious intent. (Pet. App. B at 9-10, Findings Nos. 27-29.) As the Ninth Circuit stressed, "[i]t is undisputed that Bennett made a unilateral decision on Summa's behalf to terminate all advertising in the *Las Vegas Sun*, which decision was forthwith implemented by personnel at each of the six hotel-casinos." (Pet. App. A at 8.)

Despite petitioner's intimation that withdrawal of advertising would cause grave economic consequences for the

Sun, the evidence at trial established that, following cancellation of the advertising, the *Las Vegas Sun* flourished. Both its revenue and the sale of its advertising space increased in all the months after April, 1976.

Although the findings made by the District Court and reviewed and relied on by the Ninth Circuit are thoroughly supported by the evidence, the petitioner apparently contends, without demonstrating how, that they are "clearly erroneous." In fact, the bulk of the petition is a transparent attempt to reargue the District Court's fully supported findings of fact, such as the findings that the Hughes Resorts were not competitors (Pet. App. B at 5, Finding No. 13), that the decision to cancel the advertising was a unilateral one and not the product of a contract, combination or conspiracy (Pet. App. B at 9, Finding No. 26), and that there was no anticompetitive purpose or effect in the decision to terminate the advertising. (Pet. App. B at 10, Finding No. 29.)

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

CERTIORARI IS UNWARRANTED ON THE ISSUE OF THE CAPACITY OF SEPARATE CORPORATIONS TO CONSPIRE WITHIN THE MEANING OF SECTION ONE OF THE SHERMAN ACT.

The first question petitioner contends is presented by this case involves the capacity of separate corporations to conspire within the meaning of section one of the Sherman Act. The question arises because the statutory requirement of a "contract, combination or conspiracy" necessarily contemplates a plurality of actors. However, contrary to petitioner's argument, the decisions of this Court do not hold that no "further inquiry beyond separate incorporation [is required] to determine the conspiratorial capacity of separate entities." (Pet. at 18.) In this case, further inquiry established that Summa operated the Hughes Resorts as part of a single business enterprise. (Pet. App. B at 3-5, Findings Nos. 5, 6, and 9.) Moreover, the facts of this case do not provide a proper vehicle for the Court to consider the issue in any event, because the decision of Summa's Director of Public Relations to cancel the advertising was an entirely unilateral one, made without consultation among the alleged conspirators.

A. The Decision of the Court Below Is Consistent With Prior Decisions of This Court.

In support of its contention that the mere fact of separate incorporation necessarily renders two businesses capable of conspiring under the antitrust laws, the petitioner cites four decisions of this Court, which state that common ownership and control of separate corporations does not necessarily

serve to liberate them from the impact of the antitrust laws.[4] However, unlike the lower federal courts throughout the country, petitioner reads the language contained in those opinions much too broadly. While it is clear that the mere fact of common ownership does not render separate corporations incapable of conspiring, *it does not follow that they are therefore necessarily capable of conspiracy*. Rather, the inquiry becomes a factual one, as this Court expressly acknowledged in *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19 (1962). In *Sunkist* this Court looked at substance, not form, and determined that three legally separate entities lacked the capacity to conspire within the meaning of the antitrust laws. The opinion stressed that the various entities involved were in practical effect one organization "even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect. . . ." *Id.* at 29. *Sunkist* unequivocally repudiated the unreasonably broad theory of intra-enterprise conspiracy petitioners attribute to decisions of this Court.

The Ninth Circuit was well aware of the authorities relied on by petitioner in support of its argument. (Pet. App. A at 6.) *See also, Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied* 433 U.S. 910 (1977). However, it recognized that "the mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy." (Pet. App. A at 6.) As the Ninth Circuit put it, the fact question is whether separate corporate entities are "sufficiently independent of

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[4] *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Kiefer-Stewart v. Seagram*, 340 U.S. 211, 215 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

each other for their concerted action to raise antitrust concerns." (Pet. App. A at 6.) In addition, because the District Court made fully supported factual findings that the Hughes hotels and casinos did not hold themselves out as competitors, the theoretical underpinnings of prior decisions of this Court, which held that certain commonly owned corporations could conspire, are not involved.

By twisting this Court's statement that common ownership does not liberate separate corporations from the impact of the antitrust laws into an arbitrary rule that the mere formality of separate incorporation renders affiliated corporations *per se* capable of conspiracy, petitioner has attempted to create uncertainty where none exists. Lower courts have experienced no difficulty in comprehending the actual scope of this Court's pronouncements, and they have elaborated a principled body of law for determining the circumstances under which commonly owned corporations may be capable of conspiring. *See, e.g., Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied* — U.S. — (1980); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied* 433 U.S. 910 (1977); *Ark Dental Supply Company v. Cavitron Corp.*, 461 F.2d 1093 (3rd Cir. 1972); *Far Eastern Coconut Co. v. Sunripe Coconut Corp.*, 1979-2 Trade Cases ¶ 62,878 (E.D.N.Y. 1979); *REA Express, Inc. v. Alabama Great Southern Railroad Co.*, 1976-2 Trade Cases ¶ 61,174 (S.D.N.Y. 1976); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635 (S.D.N.Y. 1976); *Call Carl, Inc. v. B.P. Oil Corp.*, 403 F. Supp. 568 (D. Md. 1975); *Chastain v. American Telephone & Telegraph Co.*, 401 F. Supp. 151 (D.D.C. 1975); *In re Penn Central Securities Litigation*, 367 F. Supp. 1158 (E.D. Pa. 1973); *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F. Supp. 868 (S.D.N.Y.

1973); *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam* 451 F.2d 593 (2d Cir. 1971).

B. The Issue of the Capacity of Separate Corporations to Conspire Is Not Raised by the Facts of This Case.

The decision to terminate the corporate respondents' advertising in the *Las Vegas Sun* was the unilateral act of Robert Bennett, respondent Summa's Director of Public Relations. As the Ninth Circuit pointed out:

> "It is undisputed in the instant case that Bennett made a unilateral decision on Summa's behalf to terminate all advertising in the *Las Vegas Sun*, which decision was forthwith implemented by personnel at each of the six hotel-casinos."
>
> Pet. App. A at 8.

Thus, the undisputed facts establish that, regardless of whether the corporate respondents theoretically had the capacity to conspire, no agreement or understanding was ever reached. As the Ninth Circuit held, it is "irrelevant that Summa's agents, the managers of the six casinos, actually implemented the decision." (Pet. App. A at 9.) *See also Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-56 n. 8 (9th Cir. 1979). Inasmuch as the court below found that Mr. Bennett's decision to cancel the advertising was a unilateral one, reached without consultation or discussion among the alleged conspirators, this record simply does not present the question of when affiliated but separately incorporated businesses can conspire under the antitrust laws. Rather, the undisputed findings establish that no agreement was ever reached and that the alleged conspiracy did not take place.

II.

THE CONDUCT INVOLVED IN THIS ACTION IS NOT ACTIVITY WHICH HAS EVER BEEN HELD TO BE PER SE UNLAWFUL AND THE OPINION BELOW IS ENTIRELY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Contrary to petitioner's assertion, this case does not involve a classic boycott of the type held to be a *per se* violation of the Sherman Act. (Pet. at 19.) The "classic boycott" has been defined by one noted commentator as "a concerted refusal aimed at depriving competitors of some needed resource, and thus making it harder for them to compete." Sullivan, The Law of Antitrust, p. 256 (1977). The unusual facts of this case simply do not fit the mold of a boycott, much less one violative of the Sherman Act. As petitioner itself recognizes, this is not a case where *competitors* are involved. (Pet. at 20.) The Sun was not a competitor of the respondents; it did not even deal in the same product or service. Invariably, in the decisions holding boycotts illegal *per se*, at least one member of the conspiracy was a competitor of the victim of the boycott. Moreover, the primary goal of a boycott is to destroy competition by coercion, yet, as the findings below establish, the purpose of the decision to cancel advertising was to accomplish a legitimate business objective. (Pet. App. B at 9-10, Findings Nos. 27-29.)

Inasmuch as the findings below establish that the cancellation of the advertising was justified by business considerations, the petitioner cannot rely on cases applying the *per se* rule to refusals to deal aimed at driving a competitor out of business. This Court's statements on the theory for applying the *per se* rule in the classic boycott context have uniformly been based on the concept that such activities normally have as their purpose the suppression of compe-

tition. *See, e.g., Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 467 (1941) (applying the *per se* rule where "the aim of petitioners' combination was the intentional destruction" of competition); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Thus, a concerted refusal to deal may be a *per se* violation *absent any justification. Silver v. New York Stock Exchange*, 373 U.S. 341, 348-49 (1963).

The lower courts have had no difficulty in comprehending that the *per se* rule applies only in those classic boycott situations where there exists a purpose of intent to injure a competitor. *See, e.g., Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 132-33 (2d Cir.), *cert. denied* 439 U.S. 946 (1978), *Hatley v. American Quarter Horse Ass'n.*, 552 F.2d 646, 652-53 (5th Cir. 1977); *Mackey v. National Football League*, 543 F.2d 606, 618-20 (8th Cir. 1976), *cert. dismissed* 434 U.S. 801 (1977); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors Ltd.*, 416 F.2d 71, 76-78 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970). The amply supported findings below refute any suggestion of such motives in this case.

Moreover, the supposed injury alleged by the Sun is simply not supported by the facts. At most, the effect was *de minimis*. Prior to cancellation, the Hughes hotels and casinos accounted for only 1.8% of the *Las Vegas Sun's* overall advertising space. Following cancellation, the newspaper's advertising sales and revenue steadily increased. (Pet. App. B at 10, Finding No. 30.) It is an established principle that a concerted refusal to deal, in the absence of an anticompetitive motive or a significant anticompetitive effect, does not transgress the antitrust laws. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir. 1976), *cert. denied* 433 U.S. 910 (1977).

This case is simply not an antitrust case, despite petitioner's attempt to style it as such. Summa's decision to discontinue advertising in the *Las Vegas Sun*, which was entirely unilateral and designed to accomplish a legitimate business objective, did not affect a competitor or competition. Indeed, the Sun was not involved in a business which was competitive in any sense with the Hughes Resorts. Consequently, this case does not present an appropriate vehicle for this Court to consider the applicability of the *per se* rule to refusals to deal. Moreover, a necessary predicate to finding a violation of section one—the existence of joint activity—is not present in this case. Consequently, this Court would not reach the question of the application of the *per se* rule to the conduct herein in any event.

Conclusion.

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAY 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 1626

LAS VEGAS SUN, INC., A Nevada Corporation,

Petitioner,

vs.

SUMMA CORPORATION, dba CASTAWAYS CASINO, FRONTIER HOTEL, and DESERT INN HOTEL; HOTEL PROPERTIES, INC., dba LANDMARK HOTEL; HUGHES TELEVISION NETWORK, INC., dba SANDS HOTEL; FIRST NATIONAL BANK OF NEVADA, dba SILVER SLIPPER; FRANK W. GAY; and CHESTER DAVIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents.

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION

Respondents Frank W. Gay ("Gay") and Chester C. Davis ("Davis") respectfully request that this Court deny the petition for a writ of certiorari, seeking review of certain portions of the opinion (reported at 610 F.2d 614 and attached to the petition) and judgment of the United States Court of Appeals for the Ninth Circuit in this case, not only for the reasons ably stated in the brief in opposition submitted by the other, corporate respondents, but also for the further reasons stated hereinafter which are applicable to Gay and Davis (hereinafter sometimes referred to collectively as the "individual respondents").

Jurisdiction

As noted in the petition, the judgment of the Court of Appeals was entered on November 15, 1979. Although a petition for rehearing was apparently filed below by petitioner, it was neither (i) served upon the individual respondents or their counsel, nor (ii) addressed to any issue involving either individual respondent. Accordingly, the petition is untimely as to the individual respondents. 28 U.S.C. § 2101(c); Supreme Court Rule 22(3).

Statement of the Case

By presenting contentions and facts which are not material to the questions it seeks to present for consideration by its petition, petitioner's statement disregards both Supreme Court Rule 23(e) and the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing parties below, and that all reasonable inference of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment entered below. Individual respondents instead adopt the Statement of the Case contained in the contemporaneous opposition brief being submitted on behalf of the corporate respondents, adding only a few matters which are peculiarly applicable to the position of Gay and Davis.

While the individual respondents were, at all times pertinent to the complaint, directors of corporate respondents Summa Corporation, Hotel Properties, Inc. and Hughes Television Network, Inc., as well as Summa's chief executive officer and general counsel, respectively, both severed all connections with those corporate entities more than a year ago. Both continue to be represented by counsel who formerly also represented the corporate respondents as well, but the other respondents have been separately represented by different attorneys since shortly prior to the oral appellate

argument below. More importantly, the individual respondents were not charged by petitioner's pleadings below with any Sherman Act violation; both were additional defendants only to one count allegedly based upon Section 8 of the Clayton Act (15 U.S.C. § 19) and two counts alleging common law tort.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

All of the Reasons Stated in the Corporate Respondents' Brief

To the extent that the individual respondents are deemed to have standing herein to so do, they adopt and incorporate all of the reasons stated in the corresponding section of the brief in opposition contemporaneously submitted on behalf of the corporate respondents.

II.

Certiorari Is Unwarranted on Any Issue as to the Individual Respondents

The petition seeks to address only questions pertaining to Sherman Act Section 1 (15 U.S.C. § 1). See Petition, pp. 2-3 (Statutes Involved; Questions Presented for Review). The sole applicability of that statute, and any questions thereunder, to this action is to the first count of the amended complaint below, regarding which neither Gay nor Davis was named or charged as a defendant. Moreover, neither of the individual respondents has any substantive or even academic interest in the questions raised in the petition. Originally named and sued by petitioner below (on other-than-Sherman-Act grounds) as directors or officers of the corporate respondents, neither has any present association with any other party. Accordingly, the petition is completely moot as to both individual respondents.

The omission or failure below by petitioner even to serve the individual respondents with a copy of the petition for rehearing of the opinion and judgment of the Ninth Circuit, which sought to reargue below essentially the same issues raised in the petition for certiorari, is both a tacit admission

that there remains no justiciable issue as between petitioner and the individual respondents, and a jurisdictional flaw. Inasmuch as the appellate court's judgment became final as to the individual respondents in November (see Rule 36, Federal Rules of Appellate Procedure), the petition, filed approximately five months later in April, is untimely as to these respondents. See Supreme Court Rule 22(3) and 28 U.S.C. § 2101(c) (petition must be applied for within 90 days from entry of judgment); *Stern & Gressman, Supreme Court Practice* 389 (5th ed. 1976) and cases cited thereat (untimeliness is a jurisdictional defect). Under such circumstances, Gay and Davis are clearly entitled to be relieved from any need to participate further as parties in this action.

Conclusion

For all the foregoing reasons, the petition should be denied; and in the event the Court should see fit to grant the petition and examine further the questions presented, the petition should nevertheless be denied as between the petitioner and the individual respondents.

Respectfully submitted,

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